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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: JONETTA T. HOLT, nka JONETTA TRUED, Petitioner/Appellant, and CHARLES L. HOLT, Respondent/Appellee.	2 CA-CV 2009-0001 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20072754

Honorable Deborah Ward, Judge Pro Tempore

REVERSED AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 In this marital dissolution proceeding, the trial court ordered respondent/appellee Charles Holt to pay child support prospectively but did not impose child support for the preceding year when the action was pending. As she did below, petitioner/appellant Jonetta Trued[1] challenges the court's refusal to award retroactive child support. We reverse and remand this matter to the trial court for the reasons set forth below.

Background

¶2 Jonetta filed a petition for dissolution of marriage with children on July 31, 2007, and Charles was served with notice on August 4, 2007. Jonetta then moved out of the family's home with their only child, Lilliana. During the year the dissolution was pending, Lilliana lived primarily with Jonetta and stayed with Charles on weekends and certain holidays.

¶3 In his answer to the petition, Charles sought sole custody of Lilliana. Later, through the conciliation court, he and Jonetta agreed on a holiday parenting schedule and determined they would share joint legal custody. The parties were able to reach an agreement relating to the distribution of their property, but they could not agree on parenting time and child support. In July 2008, a trial was held to resolve these issues.

¶4 The evidence presented showed both parents' employment was connected with forestry, which potentially affected their parenting schedules. Jonetta's job frequently required her to respond to emergencies during the forest fire season in a different town or state. Charles remained in Tucson during this time, but the rest of the

[1]The dissolution decree restored Jonetta's surname to Trued from Holt.

year his job often required him to be out of town for extended periods. Accordingly, the trial court ordered that Lilliana would primarily reside with Charles from April through September, and she would live with Jonetta from October through March. The court further ordered that when Lilliana lived with Jonetta, Charles would have parenting time every other week from Wednesday through Monday; the same arrangement applied to Jonetta when Lilliana lived with Charles.

¶5 The evidence relating to child support showed Jonetta earned nearly $30,000 per year and Charles earned about $53,000. Although Charles paid $195.56 in monthly insurance premiums for Lilliana and Jonetta, he had not provided Jonetta any child support or other financial assistance while the dissolution was pending. During this time, Jonetta had access to $50,000 in a joint bank account. Charles testified she did not ask him to pay child support at any time in 2007. In February 2008, correspondence between the parties' attorneys mentioned the issue of temporary child support, but apparently nothing resulted from the discussion.

¶6 After the trial, the court ordered Charles to pay monthly child support beginning August 1, 2008, but did not provide for retroactive support. Jonetta filed a motion for new trial in which she re-urged her request for retroactive child support and argued the court was required to order it for the year preceding the support order. Charles disputed this point and argued, *inter alia*, that Jonetta should not receive retroactive support because she did not allow him to have the parenting time he wanted and "had he had more time with Lilliana, [the amount of child support] would have been reduced." The court denied the motion after conducting a hearing on the matter.

¶7 The trial court found it had discretion under A.R.S. § 25-320(B) whether to award retroactive child support, and it determined such support was not appropriate under the facts of the case. Specifically, the court refused to award retroactive support based on its findings that Jonetta had access to community funds during the pendency of the action and Charles had made contributions during this period of time "to compensate for any court ordered support." The court also found Jonetta had waived her claim to retroactive support by not following through on her request for support in February. The court then corrected its earlier child support award and ordered Charles to pay $100 in monthly support. This appeal followed.

Discussion

¶8 Jonetta challenges the trial court's refusal to award retroactive child support under A.R.S. § 25-320(B). We generally review child support awards for an abuse of discretion. *McNutt v. McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d 300, 302 (App. 2002). An abuse of discretion occurs if a court commits an error of law in the process of reaching a discretionary conclusion. *In re Marriage of Robinson*, 201 Ariz. 328, ¶ 5, 35 P.3d 89, 92 (App. 2001). We review a trial court's conclusions of law de novo, including its interpretation of statutes, *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 48, 211 P.3d 16, 33 (App. 2009), and the Child Support Guidelines promulgated by our supreme court. *McNutt*, 203 Ariz. 28, ¶ 6, 49 P.3d at 302.

¶9 Section 25-320(B) provides, in relevant part:

> If child support has not been ordered by a child support order and if the court deems child support appropriate, the court shall direct, using a retroactive

> application of the child support guidelines to the date of filing a dissolution of marriage, . . . the amount that the parents shall pay for the past support of the child and the manner in which payment shall be paid, taking into account any amount of temporary or voluntary support that has been paid. Retroactive child support is enforceable in any manner provided by law.

Although § 25-320(B) appears to give the trial court discretion whether to award retroactive child support, Arizona law provides that every parent owes a duty to support his or her minor child. A.R.S. § 25-501(A). This duty is a parent's primary financial obligation. § 25-501(C). The Arizona Child Support Guidelines determine the amount of a parent's child support. § 25-501(C); *Little v. Little*, 193 Ariz. 518, ¶ 6, 975 P.2d 108, 111 (1999). The purpose of the guidelines is to promote consistency, both for the benefit of parents and courts. § 25-320 app. § 1(B), (C). Consequently, "[t]he amount resulting from the application of the[] guidelines *is* the amount of child support ordered," absent a particular finding warranting a deviation from the guidelines. § 25-320(D) (emphasis added); *see also* § 25-320 app. § 3 (guidelines provide presumptive amount of past child support to be ordered).

¶10 Deviation from the guidelines is permitted only if a trial court finds, in writing, that application of the guidelines would be inappropriate or unjust in the particular case and that the best interests of the child have been considered in determining the amount of the deviation. § 25-320 app. § 20(A)(1)-(3). A court is also required to calculate what the order would be with and without the deviation. § 25-320 app. § 20(A)(4), (5). Here, the trial court did not make these findings or calculations in

denying Jonetta retroactive child support. In so doing, the trial court erred as a matter of law and abused its discretion.

¶11 The trial court similarly erred in denying Jonetta past child support on the grounds specified in its order. Although the court found Charles had made contributions "to compensate for any court ordered support," this finding is without support in the record or erroneous as a matter of law. The only quantified payment Charles made on behalf of his daughter was a $195.65 monthly health insurance premium that also covered Jonetta. As the guidelines specify, the prorated cost of health insurance is added to the basic child support obligation in order to determine the total child support obligation. § 25-320 app. § 9(A). Thus, although the insurance payment would reduce Charles's support obligation, it would not eliminate it entirely. *See* § 25-320 app. § 13.

¶12 The trial court also erred in finding that Jonetta had waived her right to retroactive child support. As noted, the court based its conclusion on the fact that "there was never a follow-up" on Jonetta's initial inquiries regarding temporary child support.[2] Yet a separate section of our code provides for temporary child support, *see* A.R.S. § 25-315(B), (E), and any delay in seeking it is irrelevant to the issue of retroactive child support. By the terms of § 25-320(B), retroactive child support is that support which was owed but "has not been ordered." Accordingly, delay in seeking past child support is not a ground for denying the request but often a precondition for awarding it.

[2]Charles has characterized the inquiry as one for temporary child support, and Jonetta has not disputed this characterization. We therefore consider it as such.

¶13 The trial court further erred in finding Jonetta's access to community funds was a ground for denying retroactive child support. Even when a temporary order is in place giving parties to a dissolution action equal possession of the marital community's liquid assets, such access "does not prejudice either party's claim for . . . child support." § 25-315(F)(3). Under the guidelines, a parent's income, not her access to community assets, is generally used to determine child support. *See* § 25-320 app. §§ 5(G), 7-8. This is appropriate given the distinct nature of the child support obligation.

¶14 Following the service of a dissolution petition, each parent's income becomes separate property. *See* A.R.S. § 25-211(A)(2). Each parent also has the obligation to support his or her child according to his or her ability to pay. *See* §§ 25-501(A), (C); 25-320 app. § 1(A); *Engel v. Landman*, 221 Ariz. 504, ¶ 38, 212 P.3d 842, 851 (App. 2009). A parent may use community funds when necessary to support a child during the pendency of a dissolution action. *See* § 25-315(A)(1)(a) (creating exception for "necessities of life" to prohibition on using community funds during pendency of action). But it would be contrary to the policy embodied in § 25-315(F)(3) and the structure of the guidelines to allow a higher earning spouse, such as Charles, to satisfy his child support obligation with community funds during this period, thereby decreasing his spouse's community assets while simultaneously increasing his own separate property. Indeed, our community property statutes prevent this situation from arising.

¶15 Section 25-318(E)(3), A.R.S., permits a trial court to impress a lien on a parent's separate property or the marital property awarded to that parent to secure payment of child support. A trial court may also apportion community property so as to

satisfy one parent's child support obligation, provided such division is specifically designated in the court's decree. *See* § 25-318(R). In light of these statutes, the trial court's observation here that Jonetta "was not in any way, shape, or form unable to get whatever community funds she need[ed] to continue to take care of th[e] child," was beside the point. Charles had a separate obligation to pay child support, and Jonetta was not required to deplete the community's funds in order to maintain a child support claim. *Cf. Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶¶ 18-20, 972 P.2d 676, 681 (App. 1998) (spouse need not deplete share of community funds to maintain spousal support claim); *Thomas v. Thomas*, 142 Ariz. 386, 391-92, 690 P.2d 105, 110-11 (App. 1984) (same); *Wineinger v. Wineinger*, 137 Ariz. 194, 197-98, 669 P.2d 971, 974-75 (App. 1983) (same).

¶16 Having concluded the trial court abused its discretion in denying retroactive child support, we acknowledge the complexity of the Arizona code in this area and the significance of the argument Charles made below. By using different statutory language in similar contexts, the legislature has invited confusion as to the extent of a court's discretion and how it may be applied when ruling on retroactive child support. *Compare* § 25-320(B) (when dissolution filed, "[i]f child support has not been ordered . . . and if the court deems child support appropriate," court shall use guidelines to determine retroactive child support to date of filing), *with* § 25-320(C) (when parties lived apart before dissolution filing, "the court may order child support retroactively to the date of separation" after "consider[ing] all relevant circumstances," and "[i]f the court determines child support is appropriate," guidelines must be retroactively applied in

determining amount), *and* A.R.S. § 25-809(A) (when parentage has been established, "the court shall direct, subject to applicable equitable defenses and using a retroactive application of the current child support guidelines, the amount, if any, the parties shall pay for the past support of the child"). Furthermore, unlike other states' statutes that simply direct retroactive application of a child support award, *e.g.*, Cal. Fam. Code § 4009; La. Rev. Stat. Ann. § 9:315.21(A), our code requires a "retroactive application of the child support guidelines" to determine the amount owed. § 25-320(B). Thus, § 25-320(B) requires the court to apply the guidelines to circumstances as they existed during the time for which past child support is being ordered.

¶17 As Charles suggested below, the issue of parenting time therefore could have prevented the straightforward application of the child support order back to the date the petition for dissolution of marriage was filed. Parenting time is a factor when determining child support under the statute and guidelines. § 25-320(D)(8) & app. § 11. Because temporary custody and parenting time orders are not automatic in a dissolution proceeding, *see* A.R.S. §§ 25-401(B)(1)(a), 25-404(A), there may often be a lengthy period of time when parenting time is disputed but not judicially determined. Under such circumstances, the retroactive child support calculation may be fact-intensive, and equitable considerations could enter into the court's child support determination under the guidelines. For example, if one parent has unreasonably withheld a child from the other parent, a court may reduce the retroactive child support accordingly. *See* § 25-320 app. § 11 (adjustment to be made for parenting time "expected to be exercised by the noncustodial parent"); *cf. State ex rel. Dep't of Econ. Sec. v. McEvoy*, 191 Ariz. 350,

¶ 20, 955 P.2d 988, 992 (App. 1998) ("[I]t is within the trial court's discretion to determine whether denial of visitation rights justifies suspension of the child support payment."). After all, the guidelines are not designed to create a financial incentive for withholding a child from a parent; rather, they are to be applied so as to promote a child's best interest. *See Engel*, 221 Ariz. 504, ¶ 38, 212 P.3d at 851 ("The paramount factor a trial court must consider when applying the Guidelines is the best interest of the child."). Nevertheless, Charles was legally incorrect that Jonetta's alleged denial of parenting time relieved him of any obligation to pay retroactive child support. *See McEvoy*, 191 Ariz. 350, ¶ 20, 955 P.2d at 992 (refusal of parent to permit visitation does not automatically relieve other parent of support obligation).

¶18 We reverse the trial court's denial of retroactive child support pursuant to § 25-320(B) and remand the matter to the court to determine the amount of retroactive support Charles owes under the Child Support Guidelines. As with the analogous paternity statute, § 25-809, a presumption may be employed under § 25-320(B) that the amount of child support ordered prospectively under § 25-320(A) is appropriate to apply to the date the dissolution was filed. *See Pizziconi v. Yarbrough*, 177 Ariz. 422, 426, 868 P.2d 1005, 1009 (App. 1993) (holding court does not err under paternity statute in determining past child support based on guidelines and parent's general income and expenses rather than specific information from period predating order). A party seeking to show a different support obligation than that called for under the guidelines has the burden of proving the greater or lesser amount. *See id*.

¶19 Jonetta has requested costs and attorney fees pursuant to A.R.S. § 25-324 and Rule 21(c), Ariz. R. Civ. App. P. We grant her request upon her compliance with Rule 21.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge